

STATE OF MICHIGAN
COURT OF APPEALS

MERCY WHITNEY,

Plaintiff-Appellant,

V

DEREK MARK BLOCK,

Defendant-Appellee.

UNPUBLISHED

April 5, 2011

No. 299799

Washtenaw Juvenile Division

LC No. 08-001015-TS

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

SHAPIRO, J. (*concurring*).

I concur with the majority's decision to vacate the trial court's order changing custody, but on different grounds, as I do not agree that we can determine based on the written record whether Block met his burden to show "proper cause" or "change in circumstances."¹ I agree with the majority that the trial court erred by receiving evidence on the best interests question without having first made the threshold determination and I share the majority's skepticism as to whether such a showing was made, particularly since the trial court's findings on the best interest factors strongly suggest a rejection of the allegation of an incident of abuse on May 28, 2010.² However, the question ultimately turned on a credibility determination regarding highly divergent testimony as to those events. Because it is the trial court's role to evaluate credibility, I do not believe that we should make this determination without trial court findings on credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

I nevertheless agree that vacating the order is proper because, after hearing all the evidence, the trial court concluded "I wouldn't change custody in this case." Having concluded that there was not a sufficient basis upon which to change custody, the court, however, proceeded to change custody by ordering what it termed parenting time changes. It appears to me that the trial court concluded that, where there is an established custodial environment with each parent, the court may make any changes to either of these established custodial environments short of complete elimination by categorizing them as "parenting time" changes.

¹ MCL 722.27(1)(c).

² Moreover, but for the potential of that incident to constitute domestic violence, the evidence presented by Block regarding his other contentions fell far short of the proper cause or change in circumstances threshold.

While our Court has recognized that a parenting time scheduling change may not amount to a change in custody where the change is not significant and does not affect the overall number of parenting time days previously in effect, *Shade v Wright*, ___ Mich App ___; ___ NW2d ___ (Docket No. 296318, December 2, 2010), slip op at 6, n 1, that was plainly not the circumstances here. Indeed, the change sought by Block was a complete reversal in the amount of parenting time and required that the child transfer school districts from one side of the state to the other. See *Powery v Wells*, 278 Mich App 526; 752 NW2d 47 (2008).³

Given that the trial court concluded that a change in custody was not merited, I concur in vacating the court's order that constituted such a change.

/s/ Douglas B. Shapiro

³ I do not agree with the majority that the trial court erred by finding that an established custodial environment existed with each parent. However, that does not mean that the burden of proof on the moving party is less than it would have been had the only established custodial environment been with the non-moving party. *In re AP*, 283 Mich App 574, 602; 770 NW2d 403 (2009); *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001) (where an established custodial environment exists with both parents, “neither . . . established custodial environment may be disrupted except on a showing, by clear and convincing evidence, that such a disruption is in the child[]’s best interests”).